

*Telegraph Company*, 18 CPUC 2d 133, 1985 Cal. PUC LEXIS 1118, \*228. The Commission there cited, among other factors, the "present uncertainty as to what action the FCC will take on this issue." *Id.* On that basis, the Commission concluded that was "inappropriate to require TOD-sensitive access charges" at that time. *Id.*

Commission deferrals pending a federal agency action have not been limited to telecommunications matters. For example, in *Order Instituting an Investigation by Rulemaking Into proposed refinements for new regulatory framework for gas utilities*, 22 CPUC 2d 491, 1986 Cal. PUC LEXIS 754, \*49-50 (1986), the Commission declined to make a determination regarding the disposition of any excess capacity which two natural gas companies might have possessed on interstate pipelines because FERC had not yet acted in a manner that affected the issue. As the Commission stated, "we believe that the prudent course is to defer any Commission directive on the sharing of interstate capacity until the utilities' gas resource planning goals are made clear in the forthcoming gas procurement hearings and some further direction from the FERC is available regarding its ban on the brokering of capacity and the application of that ban to distributors." *Id.* at \*50.

Commission actions deferring a ruling pending relevant developments in federal agencies are an analog to the judicial doctrine of primary jurisdiction. In California, a court may stay or dismiss an action pending an administrative determination of the matter at issue so long as the legislature has not established a "scheme under which a court is prohibited from exercising discretion under the doctrine of primary jurisdiction . . . ." *Farmers Insurance Exchange v. Superior Court*, 2 Cal. 4th 377, 394 (1992). Absent such a legislative prohibition on the exercise of the primary jurisdiction doctrine, refusal to defer action pending an agency interpretation of its own rules can be an abuse of discretion. *Id.* at 381.

In *Farmers*, the plaintiff alleged that the defendant violated industry-specific statutory and regulations violation, *id.* at 398, and that those violations, in turn, constituted unlawful and unfair business practices under California's Business and Professions Code

§ 17200. Nonetheless, the Supreme Court concluded that a deferral to the administrative agency was called for because it was "best suited initially to determine whether [its] regulations . . . have been faithfully adhered to . . . ." *Id.* at 399. The *Farmers* court notes two policies advanced by the primary jurisdiction doctrine, it enhances court decisionmaking and efficiency . . . and it helps assure uniform application of regulatory laws." *Id.* at 391.

In this case, as in *Farmers*, Pacific alleges that defendants' conduct violates § 17200 of the Business and Professions Codes, as well as various sections of the Public Utilities Code and the Commission's local competition rules. However, each of these claims is derivative of the federal claim. Pacific can establish no violations of any state law or rules independent of Section 271(e) of the Act and the FCC Order interpreting it. Pacific did not, and indeed cannot, cite any California authority for the proposition that joint marketing is unlawful. There is nothing inherently anticompetitive or unfair about joint marketing. The department store is free to advertise both pants and shirts, the local grocer is free to advertise meat and potatoes. If the marketing materials annexed to the complaint are unlawful (which they are not) it can only be because they violate the special provisions of the Act regulating joint marketing during the transition to more competitive local telecommunications markets.

Because there is no independent basis of jurisdiction under state law, Pacific Bell's complaint should be addressed by the FCC, not by this Commission. The same considerations of comity and economical use of Commission resources that underlay the rulings listed above apply here. The FCC orders at issue do not just apply in California, they apply across the United States. Deferring to the FCC will eliminate the potential for multiple, duplicative, and potentially inconsistent rulings across the country. This is particularly true in light of the MCI petition for declaratory relief pending at the FCC, which raises the same issues raised by Pacific.

The Commission should dismiss Pacific's complaint without prejudice, since the FCC's resolution of MCI's petition will very likely make Pacific's complaint moot. If any part

of the dispute survives the FCC's determination, Pacific can refile before this Commission. In the alternative, the Commission should defer action on Pacific's complaint and stay it until the FCC has ruled on MCI's petition.

**B. It Would Be Inappropriate for the Commission to Order Interim Relief Pending Resolution of MCI's Petition at the FCC.**

Since the FCC has the authority to order the same types of interim injunctive relief as a court, see *United States v. Southwestern Bell Cable Co.*, 392 U.S. 157, 180-81 (1968), there is no need for this commission to take up the issue of the need for interim relief. Indeed, it would be inappropriate for this Commission to first issue an injunction before referring the case to the FCC. The question whether preliminary relief is warranted is within the primary jurisdiction of the FCC as much as any ultimate question on the merits. *Atchison T. & S.F. Ry. v. Wichita Board of Trade*, 412 U.S. 800, 821 (1973) ("the issuance of an injunction pending further administrative action may indicate what the court believes is permitted by national transportation policy, prior to an expression by the Commission of its view. *This is precisely what the doctrine of primary jurisdiction is designed to avoid.*") (emphasis added); see *Mical Communications, Inc. v. Sprint Telemedia, Inc.*, 1 F.3d 1031, 1038-40 (10th Cir. 1993); *Detroit, Toledo & Ironton R.R. v. Consolidated Rail Corp.*, 727 F.2d 1391, 1399 (6th Cir. 1984); *MCI Communications Corp. v. AT&T*, 496 F.2d 214, 220-22 (3d Cir. 1974); *Bell Tel Co. v. FCC*, 503 F.2d 1250, 1258 (3d Cir. 1974), cert. denied, 422 U.S. 1026 (1975); *Southern Ry. Co. v. United States*, 412 F.Supp. 1122, 1152 (D.D.C. 1976).

Thus, the Commission should only determine the merits of Pacific's motion for a preliminary injunction if it decides not to dismiss or stay the action pending resolution of MCI's petition for a declaratory ruling at the FCC. In that event, AT&T is fully prepared to demonstrate why Pacific does not meet the stringent standards that must be established in order to warrant preliminary injunction relief. Indeed, Pacific cannot demonstrate that it meets *any prong* of the four-part test that it must satisfy in order to obtain injunctive relief. It cannot

demonstrate: (1) a likelihood of success on the merits; (2) that it will suffer irreparable injury without the order; (3) that no substantial harm to other interested parties will result from the issuance of an order, or (4) that the public interest will not be harmed by the issuance of an injunction. *MCI Telecommunications Corp. v. Pacific Bell*, D. 95-05-020, mimeo at 17-19 (1995). See also, *Pacific Bell v. AT&T Communications of California, Inc.*, D. 91-10-047 (denying Pacific's request for a TRO and preliminary injunction on the ground that Pacific did not demonstrate that it would be irreparably harmed or that the harm to it would outweigh that borne by AT&T). In the absence of any one of these criteria, no injunction can issue. *H-10 Water Taxi Co., Ltd. v. Universal Marine Corp.*, D. 89353 at 12 (1987). If the Commission determines to reach the merits of Pacific's motion, AT&T will fully brief its arguments pursuant to whatever schedule is established by the Administrative Law Judge.

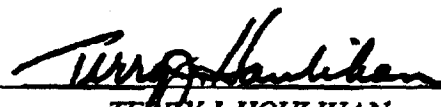
## V. CONCLUSION

This is a matter that the Commission should refer to the FCC. The central issue arises from an FCC Order that presently is a subject of a proceeding raising the interpretation of issues that Pacific seeks to resolve here. The FCC is an available forum to Pacific. The FCC has the authority to grant interim relief should it be called for. For these reasons, AT&T's motion to dismiss or stay the Pacific complaint should be granted.

DATED: May 22, 1997.

McCUTCHEN, DOYLE, BROWN & ENERSEN, LLP

By: \_\_\_\_\_

  
TERRY J. HOULIHAN  
Attorneys for Defendant  
AT&T COMMUNICATIONS OF  
CALIFORNIA, INC. (U 5002 C)

# **Exhibit B**

# Competitrack, Inc.

7 West 22nd Street, New York, NY 10011 (212) 694-0200

Length: 30 Seconds First Run: LA-01/27/97

## AT&T: Power

Master Code: ATTTL-7287



(Music)



(Music/phone ringing)



VOICE OVER: A kind of power you never had before...



is finally at your fingertips.

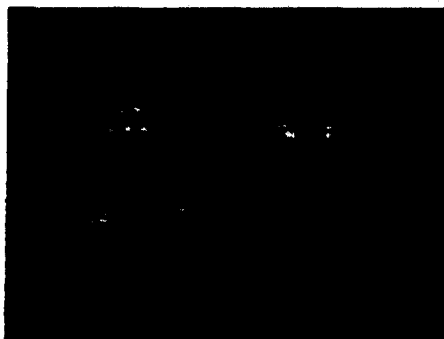


Introducing AT&T...

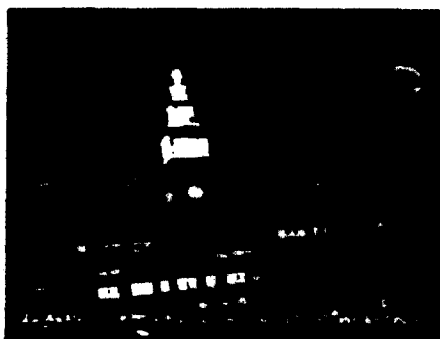


local service for California.

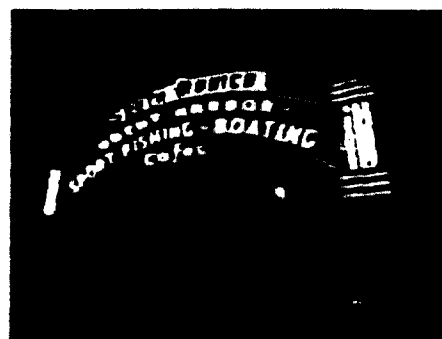
TEXT: FERRIS WARE EFFECTIVENESS



Now, the company...



that guarantees your calls across the country...

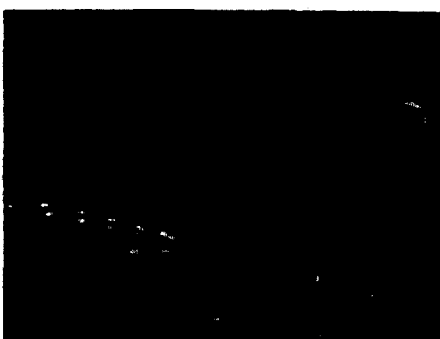


guarantees them across the street.

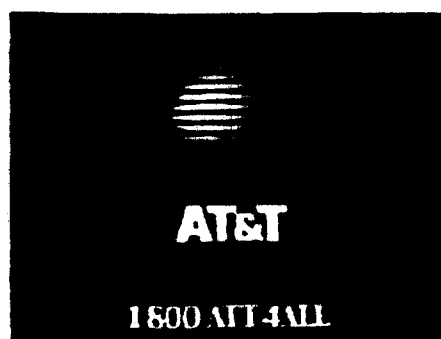
TEXT: GUARANTEES APPLICABLE TO BUSINESS CUSTOMERS ONLY.



Now you have a choice you never had before.



AT&T local service for California.



The power is here.



**AT&T**

# **FAX COVER PAGE**

**To: Pat Wang**

**For information Call: 714 853-1188**

**From: Michele Turkston**

**At: AT&T**

**Pages: 3**

**Fax Number: 714 853-5319**

**The attached Local Service Survey, when signed and completed, will allow us to continue to provide you with the highest quality consultative service in the industry.**

**The recently passed Telecommunications Act prohibits AT&T from jointly discussing our Local Service offer with other AT&T services.**

**Your signature on line 5 will functionally act as a waiver of that restriction and as a Letter of Intent to consider AT&T for your Local Service provider (when available).**

**Thank you for taking time to complete and sign this survey. Please fax your completed survey to 513-0319. If the line is busy, call me and I'll immediately release it.**

**As always, your input is invaluable. I appreciate your business and look forward to our continued partnership.**

## AT&T Local Service Customer Survey

1. Are you aware that AT&T had to provide local phone service in all 26 states?

YES

NO

2. If yes, how did you hear about this?

TV Radio Newspaper Family/Friend

AT&T Rep

Other Rep

Other \_\_\_\_\_

3. What can AT&T do to help keep you informed of the latest innovations and changes that are occurring in business communications?

Do Nothing Newsletter For Alert Call from Rep More Advertising

Other \_\_\_\_\_

4. What would be the most important decision factor for you to choose AT&T for all of your communication needs?

Price Reliability Customer Service 1 vendor Billing Features

Other \_\_\_\_\_

5. When available, what is the likelihood that you would purchase your local service from AT&T?

Very Likely Likely Unlikely Very Unlikely Don't Know

6. Would you give your approval to AT&T to use information about your current services with us to bring to your attention additional information about AT&T Local Service?

YES- Signature: \_\_\_\_\_ NO

Additional Comments:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Customer Name: \_\_\_\_\_ Customer Phone: \_\_\_\_\_

Customer Address: \_\_\_\_\_

Account Executive Name: Barbara Yarbrough AE Phone: 214.252.1122



- END -

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PACIFIC TELESIS  
NEWS  
KCBS-AM  
7:26 A.M.  
01/31/87

John Britton

01/31/87

S.F.

**CYNTHIA LOUIE (ANCHOR):** Long distance giant AT&T will be taking another step toward offering local phone service tomorrow. Details from KCBS's Mike Pulcifer.

**MIKE PULCIFER (REPORTER):** When you think of AT&T, you think of punching in eight numbers for a long distance call. But starting tomorrow small- and medium-sized business customers will be offered AT&T local telephone service. AT&T spokeswoman Alice Nagel says the company will promote its service as a type of one-stop shopping.

**ALICE NAGEL (AT&T SPOKESWOMAN):** Whether they want local, long distance, wireless, internet access or home entertainment, of which AT&T offers all, they can deal with one company for any combination of those services or all of them that they want.

**PULCIFER:** At first the service is being offered only in California. But Nagel says AT&T is moving as quickly as possible to provide it nationwide. She says a major stumbling block is that agreements have to be negotiated with existing local service providers, something that, she says, takes a lot of time. Mike Pulcifer, KCBS All News 74.

- END -

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# Questions Answers

# 4 Page 1

## AT&T Local Service in California

***Will I have to call a special Customer Service number for my local service?***

If you're an AT&T Long Distance customer, life just got easier — call 1 800 222-0300. It's the only number you need for information about your local service — or any AT&T service — for answers about calling across the street or around the globe. If you're not currently using AT&T Long Distance, you can call this number for answers about your local service, and to find out how AT&T can handle all of your calling needs.

***If I choose AT&T for my local service, can I keep my current telephone number?***

Yes, you can keep your current number. However, if at any time you wish to change your number, you always have that option.

***How do AT&T basic local service prices compare with what I'm now paying?***

Very competitively. In fact, you'll find you can have AT&T quality and reliability for no more than you're accustomed to paying for your local service and calling features.

Plus, you'll find we've made our local toll pricing much easier to understand. Now, when you make a local toll call, you pay just one low rate of 8¢ a minute, so you always know what you're spending. (See *What is a local toll call?*)

***What are my local service options?***

Our Flat Rate Service is \$11.25 a month (in most areas). This provides you with unlimited local calling within your calling area. Most local calling areas are within 0 to 12 miles of your home. Calls outside your local calling area are priced on a "per minute of use" basis.

Measured Rate Service is \$6.00 a month (in most areas). If you don't make many local calls, consider this service. You'll have a \$3 allowance for calls within your local calling area; the remaining \$3 covers the cost of the service. Any additional calls are charged based on the length of your call and the time of day placed, according to the rate schedule in your Local White Pages. To find out your local calling area, please see your Local White Pages for details.

***Will I be able to get the same kind of calling features, such as Call Waiting, Call Forwarding, or Caller I.D., I currently have?***

Yes, you can continue to have most of the services you're currently provided.

You can choose from a range of AT&T local phone service features to best suit your needs, for no more than you're now paying. In addition, you will always have the option of adding or changing phone service features at any time.

Frequently  
asked  
questions  
about  
AT&T  
local service



# More Questions & Answers

***With AT&T, can I upgrade my local service beyond what I already have?***

Sure. With AT&T, you can upgrade your local service with Inside Wire Service, Caller I.D., Caller I.D. Blocking, AT&T Voice Mail,\* Call Waiting, Repeat Dialing, Call Return, Call Forwarding, Three-Way Calling, and Distinctive Ring.

***What is a local toll call? If I choose AT&T for my local service, who will carry my local toll calls?***

A local toll call is just outside your local calling area but not far enough outside to be considered long distance. Your local toll calls will also be handled by AT&T. This means you can have AT&T reliability and service behind every call you make — local, local toll, and long distance.

***How will my local service be billed?***

If you're an AT&T Local and Long Distance customer, you'll receive a single convenient bill each month, itemizing all of the calls — local, local toll, and long distance calls — made from your home or with your AT&T TrueChoice™ Calling Card.

If you're not an AT&T Long Distance customer, you'll receive two bills each month — your AT&T bill for your local and local toll calls and a separate bill from your long distance service company.

***What other services can AT&T provide me with — in addition to local, long distance, and international calling?***

You can choose from a full range of AT&T telecommunications services, including cellular† or digital wireless mobile phone service, AT&T WorldNet™ Service for the Internet, and even DIRECTV®, which can provide you with over 200 channels of sports, movies, music, news, and entertainment.

***How can I change my local service to AT&T local service?***

It's easy. Just call 1-800-222-0300 to order AT&T local service. That's it! There are no set-up charges and no one will have to come to your home to do any special rewiring.

\* AT&T Voice Mail will be available pending tariff effectiveness. Subject to service availability.

† Available in selected areas.

## CERTIFICATE OF SERVICE

I, Helen Elia, do hereby certify that on this 9<sup>th</sup> day of June, 1997, a copy of the foregoing "Comments of AT&T Corp." was mailed by U.S. first class mail, postage prepaid, upon the parties listed below:

Frank W. Krogh  
Mary L. Brown  
MCI Telecommunications Corporation  
1801 Pennsylvania Ave., NW  
Washington, DC 20006

  
Helen Elia